**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 0 3 2015 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. We will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. At the time she filed the petition, the petitioner was a pediatric hematology/oncology fellow on the house staff of the in Minnesota. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner asserts that the evidence submitted in support of the petition is sufficient to establish eligibility for the benefit sought.

## I. Law

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

*In re New York State Dep't of Transportation*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise. *See NYSDOT*, 22 I&N Dec. at 218-19.

## II. Facts and Analysis

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on September 26, 2012. In an accompanying introductory statement, the petitioner, through counsel, asserted:

> [The petitioner] is a brilliant **pediatric hematology and oncology** specialist with particular expertise in genetic blood diseases and cancer. . . .
>
> [The petitioner] has been consistently recognized by top experts in this field. She has received prestigious awards, and her research has been published in leading journals and presented before prominent national and international conferences and meetings. . . . The world's leading experts acknowledge her unparalleled expertise in **pediatric hematology and oncology**. . . .

> Her original research has already had a direct impact on the field and has gained her nationwide recognition. . . .
>
> Additionally, her research has been cited numerous times by other researchers as well. . . .
>
> In addition, [the petitioner] frequently diagnoses and treats patients from different parts of the country on referral. . . . Because she is able to perform such advanced procedures that only a very small percentage of her peers are able to perform, she is called on to treat patients from around the country.

(Emphasis in original.) As will be discussed below, the petitioner's evidence does not support the above assertions regarding her recognition by top experts in the field, that her research has already had a direct impact on her field, or that she has been cited numerous times by others in the field. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The introductory statement included the statement that labor certification is not a realistic option for the petitioner:

> Labor certification prohibits a job offer that includes a combination of occupations See 69 Fed Reg 247 at 77394 annexed hereto. In the instant case, the record shows that [the petitioner] spends a significant amount of her time performing patient care, research, and teaching.
>
> The Bureau of Labor Statistics Occupational Outlook Handbook (OOH) describes physicians and surgeon duties as "diagnose illnesses and prescribe and administer treatment for people suffering from injury or disease." . . . There is no mention of research or teaching. The OOH describes medical scientists as those performing research on human diseases and conditions with the goal of improving human health. However, many medical scientists are not physicians. . . . Some medical scientists may also be physicians, but they generally work in laboratories instead of the hospital setting with patients.
>
> [The petitioner] does not fall directly under the category of either pure physician or pure researcher, but performs the duties of both. Recent Department of Labor trends indicate that the Department of Labor finds that this type of position involved a combination of occupations. See determination annexed hereto. This means that labor certification for an expert such as [the petitioner] would be prohibited.

The cited entry in the Federal Register promulgated a final rule issuing new Department of Labor (DOL) regulations governing labor certification. The petitioner did not submit a copy of this rule,

despite the notation that it was "annexed hereto." The relevant regulation does not match the above description. Specifically, the regulation at 20 C.F.R. § 656.17(h)(3), which appears on the cited page of the Federal Register, reads:

> If the job opportunity involves a combination of occupations, the employer must document that it has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is based on a business necessity. Combination occupations can be documented by position descriptions and relevant payroll records, and/or letters from other employers stating their workers normally perform the combination of occupations in the area of intended employment, and/or documentation that the combination occupation arises from a business necessity.

The quoted regulation does not, as asserted, "prohibit[] a job offer that includes a combination of occupations." Rather, combination occupations are acceptable, provided the employer is able to document business necessity. The petitioner did not show that the DOL has denied labor certification for a combination of teaching, research and clinical care at medical schools where those occupations are routinely combined.

The above discussion of the OOH relates to the listings for physicians in clinical practice and for medical scientists employed in laboratories. Neither of these descriptions applies to the petitioner, whose employment in the United States has taken place entirely on the house staff of teaching hospitals. The petitioner has not shown that residencies and fellowships rarely combine teaching, clinical, and research duties. Rather, the record shows that research, teaching, and clinical care all take place at medical schools and their affiliated hospitals, and thus there is ample reason to believe that medical school house staff and faculty members "customarily perform the combination of occupations." As such, labor certification allowing that combination would be available to the petitioner, in the event that a medical school sought to employ her permanently in a capacity that customarily combines research, teaching, and clinical care. Because all of the petitioner's research and teaching work has been in the context of her own medical training, still ongoing at the time she filed the petition, it is not evident that the petitioner will continue performing research or teaching, or that any employer will seek her services in those areas, after her training is complete.

Noting the prestige of the the introductory statement indicated:

> There are plenty of minimally qualified US workers who would be more than willing to take the position. However, for the top ranked institution in the field, minimally qualified experts are unacceptable. [The petitioner] was selected for her position because she is among the best in the field and can achieve superior results . . . and is capable of teaching as well as performing clinical research. This cannot be articulated in a labor certification.

The petitioner submitted no evidence to show that she "was selected for her position because she is among the best in the field." We do not question the reputation of the but there is no blanket waiver based on the prestige of a given employer.

The petitioner's house staff position is inherently temporary, comprising advanced training in a medical specialty. Labor certification applies to permanent positions, and the petitioner has not shown that the seeks or intends to employ her after she completes her fellowship.

The petitioner submitted several letters, mostly from faculty members. Dr. associate professor at the and the petitioner's "program director and . . . her mentor," praised the petitioner's clinical and teaching skills and stated that "[h]er research is progressing very well and looks very promising." Dr. did not state that the petitioner has earned "nationwide recognition" as indicated in the statement quoted above, but asserted that "[s]he is well regarded in the division of pediatric hematology-oncology at ." Describing a case in which the petitioner diagnosed Hodgkin's lymphoma in a 14-year-old girl, Dr. stated that "only leading physicians have the knowledge and expertise to make such critical diagnoses."

Dr. , assistant professor at the stated that the petitioner "is the lead author or co-author of numerous peer-reviewed publications, presentations and abstracts in top ranked national and international journals, and conferences, including " This quoted sentence implies that the petitioner's work has appeared in several publications, with the three listed titles serving as examples. The petitioner's *curriculum vitae*, however, identified only those three journals, and indicated that the article was "in press" but not yet published. The record shows that the paper is a "letter to the editor," the paper is a five-paragraph abstract of a poster presentation, and the article is a case report, published under that heading ," that predates the petitioner's training in pediatric hematology/oncology. The record, therefore, does not show that the petitioner had published any full-length, peer-reviewed research articles in the field of pediatric hematology/oncology at the time she filed the petition.

Dr. asserted that the petitioner "is currently involved in exciting groundbreaking research," and called the study summarized in a abstract "landmark research." (Dr. was the petitioner's co-author on that paper.) The record offers no objective, documentary support for these characterizations of the petitioner's work.

Dr. professor and chair of the Division of Pediatric Hematology/ Oncology, asserted that "distinguished institutions [such as the ] are reserved for the nation's foremost physician professors and clinical researchers," and stated that the petitioner "famously utilized her deep understanding of rare pediatric hematology and oncology diseases to treat a 16-month-old boy" whom she diagnosed with severe chronic neutropenia.

Two other letters are from individuals not at , but who have worked or trained elsewhere in Minnesota, and whose statements therefore indicate recognition at the local level. Dr.

director of the Hemoglobinopathy Program at stated that the petitioner's "medical research prowess is well-known throughout the medical community. . . . Her research has been published in the world's most important medical journals, Dr. who trained at the before becoming an assistant professor at the stated that the petitioner's "research has appeared in myriad high-impact factor, national and international publications, including Dr. stated specialties are gastroenterology and transplant hepatology; he claimed no training or expertise in pediatric hematology/oncology.

The only letter from an individual with no evident ties either to the or Minnesota is Dr. Dr. letter does not include a résumé or *curriculum vitae* detailing his education and past employment. Dr. claimed no personal acquaintance with the petitioner, and listed her various qualifications and credentials, stating that these attributes establish the petitioner's high standing in her field. He asserted, for instance, that the petitioner "has already made her mark in the research and clinical arena with various publications in high quality, high impact, well-reputed journals such as ." We have discussed the petitioner's publication record above.

Many of the letters contain strong praise for the petitioner's skills and achievements, but the record does not support assertions to the effect that the petitioner is "well-known throughout the medical community" as a "leading physician" in her specialty.

The director issued a request for evidence (RFE) on April 17, 2013. The director instructed the petitioner to "submit documentary evidence to establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director specifically requested documentary evidence to support the assertion that the petitioner's "research has been cited numerous times by other researchers."

The petitioner's response to the RFE, outlined in a statement from counsel, did not include any evidence of citation, nor did it address the director's request for such evidence or acknowledge the earlier claim. An updated list of publications added the titles to the three journals identified previously. The RFE response emphasized the petitioner's peer review work for the journals but the petitioner submitted no evidence to show that peer review for those journals is a mark of distinction.

The RFE response indicated that the petitioner "was the first to discover[] the effect of separation of monocytes (infection fighting cells) on cancer cells and its potential in advancing cancer treatment by radiation," leading to a "Patent application – accepted by Ventures and Office of Intellectual Property." The includes an "Invention Disclosure and Assignment Record" indicating that the beneficiary holds a 25% interest in an invention called "" (Dr. holds the remaining 75% interest.) The disclosure form is not a patent application, but an

internal document. The record does not show whether or not the subsequently filed a patent application.

Counsel indicated that the petitioner's work received "significant research funding, including from the federal government, which of course only funds researchers with a significant track record in research that is regarded as very original and practically important to the scientific community." The petitioner submitted no evidence from any government funding agency to support this characterization. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The RFE response included the assertion that the petitioner "has recently been selected for a position in pediatric coagulation at the " Correspondence in the record shows that the position in question is "a one-year fellowship in the selective training program." Thus, it appears as if the assignment is not recognition of the petitioner's expertise in the area, but a "training program" to enable the petitioner to acquire that expertise.

Much of the new evidence submitted in response to the RFE concerns developments that occurred after the petition's September 26, 2012 filing date. The invitation to review papers for dates from May 14, 2013. The date on the "Invention Disclosure and Assignment Record" filed with the is February 13, 2013. The selection notice from the is from June 3, 2013. None of these developments establish eligibility for the waiver. They show only that the petitioner is an active researcher and that, as of June 2013, was still undergoing training at the . Furthermore, an applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The director denied the petition on December 2, 2013, stating that the petitioner had established the intrinsic merit of her medical specialty, but had not satisfied the remaining prongs of the *NYSDOT* national interest test. The director acknowledged that the petitioner played a part in an innovation for which the may seek patent protection, but found that the petitioner had not established the significance of that innovation. The director also acknowledged the submission of "a number of reference letters," but the director found these letters lacked corroboration and were therefore insufficient to "establish that the petitioner has had a substantial impact in the field of endeavor." The director also noted the lack of evidence that others have cited the petitioner's published work.

On appeal, the petitioner submits a statement similar to the one submitted in response to the RFE. The statement emphasized the petitioner's published work, her "patent application," and information about federal grant funding, as well as "[n]umerous testimonies submitted with the original application as well as with the response to the request for evidence." With the exception of the grant

funding, the director's decision addressed each of these factors, and the appeal does not rebut the director's findings.

With respect to the remaining assertion that the petitioner's work has received federal grant funding, the record lacks evidence from the funding agencies to establish the significance of that funding or of the petitioner's roles in the funded projects. Therefore, the petitioner has not overcome the director's decision by asserting that federal funds have paid for her research.

Furthermore, all of the petitioner's research and teaching activities have been in the context of her own ongoing fellowship training. Performance of those duties while on the house staff of a teaching hospital provides no assurance that the petitioner will continue to teach or conduct research after she completes her training. As counsel had asserted at the outset of the proceeding, the duties of a physician do not normally entail those functions. Therefore, a national interest waiver application predicated in part on teaching and/or research duties must include some assurance that those functions will continue beyond being an integral part of a temporary training period.

## III. Conclusion

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole").

As is clear from the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

We will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.